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No. 82-15

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

RAY E. OLIVER - - - - - - - Petitioner

versus

UNITED STATES OF AMERICA - - Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY TO THE MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

FRANK E. HADDAD, JR.
529 Kentucky Home Life Building
Louisville, Kentucky 40202
(502) 583-4881
Counsel for Petitioner

Of Counsel:

ROBERT L. WILSON
WILSON & SMITH LAW OFFICES
P.O. Box 110
Jamestown, Kentucky 42629

WESTERFIELD-SONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 82-15

RAY E. OLIVER - - - - - *Petitioner*

v.

UNITED STATES OF AMERICA - - *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY TO THE MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In its Memorandum in Opposition to the Petition for Writ of Certiorari filed in this case, the United States has raised an argument which merits reply. The Respondent contends "whatever the merits of Petitioner's contention, it is presently not ripe for review by this Court." [Mem. in Opp., p. 4]. The United States urges the Court to withhold its jurisdiction so that the case may be tried without "further delay", even though this Court has grant certiorari on the identical issue in *Florida* v. *Brady*, cert. granted No. 81-1636 (May 24, 1982). In support of this proposition the government states "[P]etitioner can reap the benefit of that decision on his post-trial appeal, if he is convicted." [Mem. in Opp., p. 5]. Peti-

tioner submits that this case is in fact ripe, and that the suggestion by the United States raises the possibility of needless and costly litigation, a conviction based upon unconstitutional search and seizure procedures, and is unsupported by case law.

Beyond this, the United States seeks to restrain this Court from granting the Petitioner an opportunity to appeal the decision of the Court of Appeals after having themselves already appealed adverse decisions on the same issue two times. The District Court suppressed the evidence, and the government appealed. [Pet. for Writ, App. A]. A panel of the United States Court of Appeals for the Sixth Circuit affirmed the suppression and the government appealed. [Pet. for Writ, App. C]. Now, after having had their day in court three times, the United States proposes that the decision, in their favor, of the Sixth Circuit setting en banc is a non-appealable order. The incongruity is apparent. In fact, this Court has declared that appeals by the government are not favored. *Will* v. *United States,* 389 U. S. 90, 19 L. Ed. 2d 305, 88 S. Ct. 269 (1967). It is clear that only a ruling on this issue by this Court will finally resolve this issue.

The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. §1254(1). [Pet. for Writ, p. 1]. Congress has provided in §1254(1) for review by the Supreme Court:

> (1) by writ of certiorari granted upon the petition of any party to any civil or criminal case, ***before or after rendition of judgment or decree.***

It is clear that this Court's jurisdiction pursuant to the statute is plenary and comprehensive. The Petition before the Court is certainly ripe and falls within the ambit of its jurisdiction. Indeed, the very nature of the order below, the suppression of evidence without which there would be no case at all, lends itself to the issuance of the writ.

As early as 1897 this Court found that certiorari, although ordinarily issued after a final decree, may be issued if the Court is of the opinion that the facts of the case require an earlier interposition. *The Conqueror,* 166 U. S. 110, 113, 114 (1897). The facts herein require such an interposition by this Court. Should the issue presented by this writ be resolved in Petitioner's favor, the evidence obtained by the warrantless search and seizure would be suppressed, and the rights of the Petitioner will have been defined and vindicated. Further proceedings, in the absence of a ruling by this Court upon the admissibility of the evidence, could be a waste of time for the courts below, and, more importantly, could result in an erroneous conviction of the Petitioner, a conviction upon evidence obtained by methods this Court presently has the opportunity to judge.

This Court has consistently granted certiorari in cases in which the issues, like the one herein, were essential to the resolution of the case as a whole. In *United States* v. *General Motors Corp.*, 323 U. S. 373, 89 L. Ed. 311, 65 S. Ct. 357 (1945), the Court reviewed a trial court's refusal to permit proof of certain items of damages in a case not yet fully tried, because the

ruling was "fundamental to the further conduct of the case." 323 U. S. at 377. The issue of whether or not the only evidence in the government's case against the Petitioner was properly suppressed by the trial court is certainly fundamental to the further conduct of this case. In fact, it is the one factor without which the case cannot continue.

For similar reasons this Court reviewed rulings in *Land* v. *Dollar,* 330 U. S. 731, 734 n.2, 91 L. Ed. 1209, 67 S. Ct. 1009 (1947), and *Larson* v. *Domestic and Foreign Commerce Corp.,* 337 U. S. 682, 685 n.3, 93 L. Ed. 1628, 69 S. Ct. 1457 (1949), where, as here, the case would require further proceedings.

There are additional considerations. This Court in *Dickinson* v. *Petroleum Conversion Corp.,* 338 U. S. 507, 94 L. Ed. 299, 70 S. Ct. 322 (1950), indicated that issues may arise that demand immediate resolution in order that the Defendant's rights be preserved. These considerations include "the inconvenience and costs of piecemeal review on one hand, and the danger of denying justice by delay on the other." 338 U. S. at 511. Furthermore, the requirement of finality is to be given a practical rather than a technical construction. *Cohen* v. *Beneficial Loan Corp.,* 337 U. S. 541, 93 L. Ed. 1528, 69 S. Ct. 1221 (1949).

This Court's jurisdiction under 28 U.S.C. §1254(1) is comprehensive in criminal actions as well. This Court noted in *United States* v. *Clark,* 445 U. S. 23, 63 L. Ed. 2d 171, 100 S. Ct. 895 (1980), that jurisdiction under §1254(1) follows the same rule as 28 U.S.C. §1252. In *Clark,* the Court found that §1252, with its

"permissive language providing that any party may appeal from an interlocutory or final judgment," provides ample jurisdiction for the Court to grant certiorari.. 445 U. S., n.2 at 25.

Finally, Chief Justice Burger has stated that review may be granted by the Court even *before* judgment is rendered:

> "Any case decided in any district court with a genuine need for swift review by the Supreme Court can be the subject of a petition for certiorari before judgment." Burger, *Annual Report on the State of the Judiciary,* 62 A.B.A.J. 443, 444 (1976).

This Court's jurisdiction as described by 28 U.S.C. §1254(1) is plenary. Case law, fundamental fairness and practical considerations support the jurisdiction of this Court to review the merits of this issue as presented by the Petition for a Writ of Certiorari. Counsel for the Petitioner respectfully requests this Court to accept review of this case so that the fourth amendment right of the Petitioner to be free from unlawful searches and seizures may be preserved without fur-

ther proceedings in the Courts below, which proceedings are unreasonable in the absence of a determination of this issue by the Court.

Respectfully submitted,

FRANK E. HADDAD, JR.
529 Kentucky Home Life Building
Louisville, Kentucky 40202
(502) 583-4881
Counsel for Petitioner

Of Counsel:

ROBERT L. WILSON
WILSON & SMITH LAW OFFICES
P.O. Box 110
Jamestown, Kentucky 42629